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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 588

LEONARD J. MOORE, ET AL., *Petitioners,*

v.

CAPITAL TRANSIT COMPANY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners respectfully pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit, entered September 8, 1955, affirming the judgment of the United States District Court for the District of Columbia directing the entry of judgment for the defendant notwithstanding a jury verdict in favor of plaintiffs in the sum of $36,000.00, or, in the alternative, granting a new trial.

OPINIONS BELOW

The United States District Court for the District of Columbia set aside a jury verdict in favor of male petitioner for $34,000. and in favor of female petitioner for $2,000. and entered a judgment for defendant, notwithstanding the verdict (R. 300). The opinion of the District Judge is not reported and was an oral opinion from the Bench (R. 295-297). The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 305) is reported at 226 F. 2d 57 and will probably appear in 95 U.S. App. D.C. .

JURISDICTION

The decision and judgment of the Court of Appeals were entered on September 8, 1955. Chief Justice Warren extended the time for filing the Petition for Writ of Certiorari to and including the 6th day of January, 1956. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code (28 U.S.C. 1254(1)).

QUESTIONS PRESENTED

The male petitioner sued for personal injuries received when the Yellow Cab which he was driving was struck and demolished by defendant's street car at a light controlled intersection. Female petitioner, his wife, sued for loss of consortium. Respondent offered no evidence to contradict the evidence that the street car ran through a red light when it struck the Yellow Cab, and was moving at an excessive rate of speed. (R. 284). Respondent offered evidence tending to show that the motorman had an unforeseen and unanticipated fainting spell without any warning and that plaintiff's injuries were due to an inevitable or unavoid-

able accident. From all the evidence, the jury could have found: 1) that the accident occurred as contended by respondents; 2) that the accident was due to the negligence of motorman in operating at an excessive speed and going through a red light and failing to keep a proper lookout; 3) that the motorman had no fainting spell, or that, if he did, it was AFTER a previous collision of the street car with a Ritz Cab, or AFTER the collision with the Yellow Cab, or thereafter when the Yellow Cab was pushed into a third automobile; 4) that the motorman, if he fainted, did so as a result of his own negligence when he was stricken by fright upon discovering that through inattention and negligence, he was about to have an accident which he had no time to prevent, so that his negligence combined with the alleged fainting spell, to cause petitioner's injuries.

Respondent's oral motion for judgment non obstante veredicto, or in the alternative, for a new trial, made after the jury had brought in a verdict for petitioners, was granted by the District Court.

Affirmance of the Trial Judge's order by the Court below raises these questions:

1) Where, on conflicting evidence, or evidence from which different inferences may reasonably be drawn, the defendant's negligence and the plaintiff's freedom from contributory negligence, have been resolved in plaintiff's favor by the verdict of a jury, can a trial judge set aside the jury verdict and enter judgment for defendant non obstante veredicto?

2) Where there is conflicting evidence, or different inferences may be drawn by reasonable men, as to disputed factual issues on which the outcome of the case hinged, and a jury has resolved these matters in favor

of the plaintiff, can a District Judge invade the province of the jury and deprive plaintiffs of their constitutional right to a jury trial, by setting aside the verdict and entering a judgment for the defendant?

3) Can a District Judge properly inject himself into a trial by taking over the functions of counsel, and suggesting motions to be made by counsel and grounds in support of the suggested motions?

4) Can factual issues tried by a jury be re-examined by the trial judge other than according to the rules of the common law, in violation of the constitutional right to a jury trial as provided in the Seventh Amendment to the Constitution?

5) Where an alleged "sudden illness" of a streetcar motorman combined or concurred with his own negligent acts to cause a collision, can a trial judge exculpate the defendant from liability for negligence, in the face of a jury verdict finding defendant negligent and awarding damages to the plaintiffs?

6) Was the claimed illness of the motorman or the time of the illness, and the evidence with respect thereto, so conclusive that all reasonable men could only come to one conclusion, or could different inferences be drawn?

7) Was the evidence with respect to the claimed illness of the motorman so conclusive as to require the trial judge to set aside the jury's verdict in favor of the plaintiffs and to enter judgment for the defendant n.o.v.?

8) Where all the evidence (or all the evidence together with the evidence erroneously excluded by the trial judge), construed most favorably to plaintiffs,

shows that defendant's motorman did not have a sudden illness as claimed; that if motorman fainted or became unconscious, it was due either to an injury sustained in the accident or due to fright resulting from his own prior negligence; that the street car was going faster than the speed limit and ran through a red light signal at the intersection where it struck plaintiff's taxicab; that the motorman had received some injuries in the accident as evidenced by an abrasion on his nose and a slight abnormality in the first electroencephalogram taken shortly after the accident; that there was conflicting evidence (or that different inferences could reasonably be drawn from the evidence) as to whether the motorman's condition arose *prior* to the accident, or whether his condition occurred after the first, second or third collisions; or different inferences could be drawn by reasonable men as to whether the motorman had become sick at all or was just plainly negligent and attempting to excuse his negligence by feigning sudden illness; and where all such evidence and the legitimate inferences therefrom became a question of fact for the jury, which was resolved in favor of the plaintiffs, was the trial judge justified in entering judgment for defendant, notwithstanding the verdict in favor of the plaintiffs?

9) Did the Court of Appeals compound the error of the trial judge by failing to apply the proper rule or test in examining the action of the trial court in setting aside the verdict of the jury; namely, to balance the weight of the evidence AGAINST the judge's determination and in favor of the jury's determination?

10) Did the Court of Appeals permit and sanction such a departure from the accepted and usual course of judicial proceedings in affirming the action of the

trial judge as to call for the exercise of this Court's power of supervision?

11) Did the Trial Court err in excluding evidence tending to discredit motorman's testimony as to his health, of his request to take leave from work just prior to the accident, and testimony of Dr. Murphy that motorman had a head injury?

CONSTITUTIONAL PROVISION AND RULE INVOLVED

Constitution of the United States:

Amendment VII.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Federal Rules of Civil Procedure, Title 28, U.S.C.A. Foll. Sec. 723

Rule 50. Motion For a Directed Verdict.

> (b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this

motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

STATEMENT

The male petitioner, Leonard J. Moore, operator of a Yellow Cab, was seriously and permanently injured in a collision between his cab and a streetcar operated by Capital Transit Company at the intersection of 3rd Street and Pennsylvania Avenue, N. W., in the District of Columbia, on August 3, 1950. The Yellow Cab, proceeding south on 3rd Street to the left of a Virginia automobile, owned and operated by one Hubert Hoke, entered the intersection on a green light at or about the time that a northbound Ritz Cab owned and operated by one, Alvin L. Thomas, likewise entered the intersection on a green light. The streetcar, westbound on Pennsylvania Avenue entered the intersection AGAINST the red light, collided first with the Ritz Cab and then with the Yellow Cab, pushing the Yellow Cab along the track into the Virginia automobile of Hubert Hoke, and Hoke's automobile was pushed, in turn, against a bicycle ridden by one, Jack Moore. The Yellow Cab, with the streetcar imbedded in its left side, came to rest at the streetcar loading platform WEST of the 3rd Street intersection.

The Ritz Cab, proceeding north on 3rd Street, reached Pennsylvania Avenue while the light for northbound traffic was green, and entered the intersection and started across Pennsylvania Avenue on a green

light (R. 40) and the light was still green when the Ritz Cab was struck by the streetcar. Another northbound auto had completed the crossing of Pennsylvania Avenue on the same green light just ahead of the Ritz Cab. (R. 41).

The streetcar had started up from a stop at Peace Monument (R. 206) which is 846 feet from the east curbline of 3rd Street (R. 101) and proceeded west on Pennsylvania Avenue toward the intersection of 3rd Street and Pennsylvania Ave., N. W. As the streetcar approached the intersection, the traffic light for the westbound streetcar was RED, and the streetcar picked up speed and entered the intersection against the red light (R. 24). As the streetcar entered the intersection on the red light, it was moving at a speed of about 30 to 40 miles per hour (R. 42). There was no gong or warning sounded by the streetcar as it approached and entered the intersection (R. 26).

As the driver of the northbound Ritz Cab entered the center of Pennsylvania Ave., he observed the streetcar enter the intersection against the red light at a high rate of speed. He immediately applied his brakes and swerved to the left, but his cab collided with the streetcar. The right front of the Ritz Cab collided with the left front side of the streetcar at a point opposite the motorman's seat. (R. 41). The point of impact between the streetcar and the Ritz Cab was 39 feet west of the east curb of 3rd Street and 60 feet north of the south curb of Pennsylvania Ave. (R. 12).

3rd Street is 76 feet wide, and Pennsylvania Avenue is 110 feet wide. (R. 11). After colliding with the Ritz Cab, the front of the streetcar struck the Yellow

Cab on its left side, about the center of the cab, which was then crossing the westbound car tracks, causing the right rear of the Yellow Cab to strike the left front fender of the Virginia automobile (R. 25), just as the Virginia car was 18 to 20 inches north of or short of reaching the westbound car tracks. (R. 34) The Virginia automobile was knocked around to its right and came to a stop near the point of collision. The point of impact between the streetcar and the Yellow Cab was 52 feet west of the east curb of 3rd Street and 48 feet south of the north curb of Pennsylvania Avenue (R. 12) or 13 feet west of the point where the streetcar collided with the Ritz Cab.

After striking the Yellow Cab, the streetcar continued at undiminished speed, crossed the intersection, pushing the Yellow Cab ahead of it, until the streetcar came to a stop with its rear about 116 feet west of the point of its impact with the Ritz Cab (R. 13); when the streetcar stopped its front was still imbedded in the left side of the Yellow Cab (R. 14)

As a result of the collision, Mr. Moore sustained serious, permanent and disabling injuries, consisting of multiple comminuted fractures of the left leg, hip and shoulder, and fracture of the pelvis, and damage to his brain. The brain damage was accompanied by retrograde amnesia, with the result that Moore was unable to recall any of the circumstances of the collision and any events which transpired from a time about four hours before the accident until ten days or so after the accident (R. 57-58, 92).

The traffic and motor vehicle regulations, applicable to streetcars, required the streetcar to be operated at a reasonable speed, and not in excess of 25 miles per

hour, to slow down on approaching a street intersection, and to stop for the red traffic light before entering the intersection and to remain motionless until the green light appeared (R. 102-106).

The foregoing constituted the plaintiffs' case in chief. The principal defense asserted by the defendant, and the basis upon which the Trial Court granted the judgment n.o.v., was that the accident was caused by an act of God, an unavoidable accident, because the motorman was suddenly stricken with a convulsive seizure of which neither he nor his employer, the defendant, had any prior warning or reason to anticipate, which rendered it impossible for the motorman to control the streetcar; that the streetcar was out of control prior to and at the time it entered the intersection against the red light. Defendant offered no proof to controvert the evidence offered by plaintiffs that the streetcar entered the intersection against a red light and in violation of the pertinent traffic regulations.

In support of its defense that the accident was unavoidable because of the sudden illness of the motorman, defendant offered testimony of the motorman and four passengers on the streetcar. Three of the passengers, Shreve, Gregory and Funny, did not pay any attention to or notice the motorman until they heard a scream (R. 115, 133, 135, 143); the fourth passenger, Chase, said there never was a scream at any time (R. 153); the first three passengers heard only ONE crash and that was about the same time or following the scream (R. 120, 121, 136, 146). The fourth passenger, saw or heard the crash with the Ritz Cab and the second crash with the Yellow Cab (R. 154).

The motorman remembered nothing from the time he last stopped the street car at the Peace Monument

until the time he was sitting on the front step of the streetcar. He had no recollection of colliding with 2 taxicabs (R. 161-162). As to his health, he had never been seriously ill before the accident, never had any period of blackout, fainting spells, or unconsciousness either prior to the accident, or after the accident to the time of trial, some three years later, with the exception of the time of the accident. He spent six days at Emergency Hospital following the accident, although the hospital record was "missing" and was not in evidence at the trial.

In rebuttal, plaintiffs called Thomas Luck, who was also a passenger on the streetcar and sat on the left hand side IMMEDIATELY BEHIND THE MOTORMAN (R. 278) and was the closest one to the motorman. He noticed NOTHING UNUSUAL before accident occurred. (R. 279). The FIRST thing he noticed was when the Ritz Cab hit the streetcar on the left hand side (R. 279), where he was seated. NO ONE PASSED THE POSITION IN WHICH HE WAS SEATED BEFORE THIS CRASH OCCURRED. (R. 279, 280) The first scream or outcry that he heard was AFTER the crash. (R. 280).

To establish the motorman's sudden illness which it alleged, defendant called *Dr. William R. Strong,* a resident at Emergency Hospital; he produced only a single card being the emergency room record and the complete hospital record could not be found (R. 123). His diagnosis was an abrasion of the motorman's nose and a possible head injury of undetermined type. The physical examination was essentially NORMAL (R. 123-124). The second medical witness for defendant was *Dr. Hugo V. Rizzoli* who examined the motorman two and one-half hours after the accident at the request of Dr. Frank Gantz, the defendant's Compensation

surgeon; at the time of the examination, the motorman was fully conscious and well oriented. (R. 209) Upon examination, he found an abrasion over the root of the nose. The neurological examination was negative. (R. 208, 209). The motorman did not remember anything that happened immediately preceding the accident. It was the witness' *impression* that the motorman had a convulsion which rendered him unconscious (R. 210); patient (motorman) gave no history of previous illness, no history of spells of unconsciousness or head injuries, and was apparently normal, with normal temperature, pulse, and blood pressure. He did not appear to be acutely ill. (R. 209). Dr. Rizzoli located the abrasion on the nose as between the eyes, or the "junction of the nose with the forehead" (R. 209); his reflexes were normal. That he did not know what the cause of this "convulsion" was; that *it was possible* the motorman could have had a small clot in one of the vessels of his brain to precipitate it. (R. 210) That there were numerous causes for convulsions and he did not know the cause of this one (R. 211). That various tests were performed on the motorman and the one positive finding was an abnormality of the brainwave test. As to the cause of the alleged convulsion, the doctor said: "As to the cause of the convulsion, one can ONLY HAVE AN OPINION, BUT ONE CANNOT BE SURE". (R. 215) His opinion was that the motorman had an occlusion of a small artery in the brain which disturbed the brain waves enough to produce a convulsion.

Cross examination brought out that a person could have such a convulsion and have a warning of it in advance, and not remember it afterwards (R. 216); most of them DON'T REMEMBER (R. 217). THAT THERE

WAS NOTHING IN HIS EXAMINATION TO INDICATE THAT MOTORMAN HAD A CONVULSIVE SEIZURE EXCEPT THE ELECTROENCEPHALOGRAM AND THE HISTORY. (R. 219). THAT A BLOW ON THE HEAD OR A SLIGHT CONCUSSION WOULD PRODUCE THE SAME BORDERLINE ABNORMALITY ON A BRAIN WAVE TEST (R. 219) Even Dr. Rizzoli testified that a person could faint from fright or emotional upset of some kind (R. 226) or lose consciousness from a blow to the head. This very first electroencephalogram was taken by Dr. James Peter Murphy at the direction of Dr. Rizzoli and a report of the test was sent to Dr. Rizzoli. He never ordered any further electroencephalograms (R. 227-228).

Plaintiffs called *Dr. James Peter Murphy,* a specialist in neurological surgery and electroencephalography, who reported the first brain wave test on the motorman in August of 1950 at the request of Dr. Rizzoli; that the first test was abnormal. He took a second test on June 22, 1953 (almost 3 years after the accident), and a third one on July 3, 1953, and the latter two were normal. (R. 237) This witness made a complete examination of the motorman on June 20, 1953, when he obtained a history which was negative; at that time, the motorman stated to Dr. Murphy that "to the best of his recollection and memory on August 3, 1950, he felt somewhat tired" (R. 238) and that he requested leave from work. The Court sustained an objection to the "leave from work". The court also excluded the portion of the history where the motorman stated that he may have lost consciousness from fright and that he was knocked out against the front of the streetcar (R. 242).

The entire history obtained from the motorman by Dr. Murphy was negative as to any clinical stigma of

an epileptic attack (R. 261). Based on his examination, history obtained, and the three EEGs, Dr. Murphy's opinion was that any loss of consciousness suffered by the motorman on August 3, 1950 was NOT DUE TO A CONVULSIVE SEIZURE. (R. 265). He further testified that unconsciousness can come from fright; also that with a loss of consciousness patients sometimes have amnesia (R. 267) and that this motorman had a retrograde amnesia for the period preceding the accident and a few minutes after the event. (R. 267-268). He also testified that the head injury sustained by the motorman accounted for the abnormal brain wave report made shortly after the accident (R. 263); that he questioned whether the motorman did lose consciousness (R. 264); that there is absolutely no possibility that the motorman had a convulsive seizure or epileptic attack (R. 264-266). For some reason the Trial Court saw fit to strike and rule out this pertinent testimony (R. 264), that the motorman fell and hurt his head and that this accounted for the abnormal EEG. At the close of all the evidence, defendant moved for a directed verdict which was overruled, and the case was submitted to the jury. Although the charge and instructions to the jury were weighted in favor of the defendant, the jury brought in a verdict for the male plaintiff for $34,000. and the female plaintiff, his wife, for loss of consortium, for $2,000.

Thereupon, defendant made an ORAL MOTION for judgment non obstante veredicto, and the Court suggested an alternative motion for new trial, and then granted both motions over objection of plaintiffs.

On this record, the Court of Appeals affirmed the Trial Court, although the transcript of all evidence adduced at the trial was before it. In its opinion, the

Court of Appeals conclusively presumed that the motorman was unconscious when the streetcar ran the red light (R. 307), although it is submitted that there was conflicting testimony and certainly conflicting inferences could be drawn by equally reasonable men. In short, the Court below failed to apply the proper test where a trial judge has set aside the verdict of a jury, and entered judgment n.o.v.; namely, to balance the weight of the evidence AGAINST the judge's action in favor of the jury's determination. It is respectfully submitted that giving the plaintiffs the full effect of every legitimate inference from all the evidence, reasonable men could find that the accident was caused by the negligence of the motorman, and not as claimed by defendant.

REASONS FOR GRANTING THE WRIT

Of the reasons usually advanced for the allowance of a Writ of Certiorari, there are several present in this case. The court below has decided important questions of Federal law in conflict with its own earlier decisions, and in conflict with the applicable decisions of this Court. In addition, the court below has permitted and sanctioned such a departure from the accepted and usual course of judicial proceedings in testing the propriety of a judgment n.o.v. and in the interpretation of Rule 50(b) of the Federal Rules of Civil Procedure as to call for the exercise of this Court's power of supervision. The decision below also decides questions of general importance and of substance relating to the right to jury trial under the Seventh Amendment to the Federal Constitution and Rule 50(b), F.R.C.P., and in deciding these questions has not given proper effect to the applicable decisions of this Court.

I.

The Decision of the Court of Appeals is in Conflict With Its Own Earlier Decisions and the Applicable Law in the District of Columbia

Petitioner contends that the Trial Judge erred in setting aside the verdict of the jury and entering judgment n.o.v., or in the alternative, for a new trial, since there was a factual issue based on conflicting testimony and conflicting or different possible inferences from the evidence, as to whether defendant's motorman had a convulsive seizure; as to the time of such seizure, that is, whether BEFORE or as a result of the collision and/or his own negligence; that these issues were resolved by the jury in favor of the petitioners. That in such a situation, the appellate court reviewing the action of the trial judge was required to view the evidence MOST FAVORABLY TO PETITIONERS, and after giving them the full effect of every legitimate inference therefrom, to balance the weight of the evidence AGAINST the judge's determination and in favor of the JURY'S determination. The leading case enunciating this rule in the District of Columbia is *Shewmaker* v. *Capital Transit Co.*, 79 U.S. App. D.C. 102; 143 F. 2d 142. In that case, as in this, the Trial Court had set aside the verdict of a jury in favor of plaintiff and entered judgment n.o.v. for the defendant. The Court of Appeals in Shewmaker REVERSED the action of the trial judge, holding that if reasonable men might differ, the case was properly submitted to the jury and the Court could not properly set aside the verdict of the jury. In an opinion by Justice Justin Miller, concurred in by Justices Edgerton and Thurman Arnold, the Court below reversed and re-instated the verdict of the jury, stating:

> "The same rule is applicable on a motion to set aside the verdict under Rule 50, F.R.C.P. * * * Unlike the situation which exists when the judge acts as the trier of the facts, the appellate court is required to balance the weight of the evidence AGAINST the judge's determination and in favor of the jury's determination. The question is NOT whether there is sufficient evidence in the record to support the findings and decision of the judge, but whether there is evidence upon which reasonable men might differ as to negligence and other elements of liability."

This case (Shewmaker) was cited and approved in the later case of *Simmonds* v. *Capital Transit Co.*, 79 U.S. App. D.C. 371; 147 F. 2d 570 in another panel which included former Chief Justice Groner of that court. In Simmonds, the trial judge had also set aside the verdict of a jury and entered judgment n.o.v. for the defendant. AGAIN the Court of Appeals REVERSED and re-instated the verdict of the jury, repeating the rule stated in Shewmaker. The court below also quoted pertinent language of THIS court in *Montgomery Ward* v. *Duncan*, 311 U.S. 243; 61 S. Ct. 189; 85 L. ed. 147 which shows the rigor of the rule. In Simmonds, the court below said:

> "It is true there was conflicting and contradictory evidence and the trial judge was justified in concluding that the evidence preponderated against appellant's (plaintiff's) allegations and contentions. BUT THAT WAS NOT THE TEST TO BE APPLIED UPON A MOTION FOR JUDGMENT N.O.V. Assuming the correctness of appellant's testimony, he, as a pedestrian, had the right of way and appellee's motorman was, as a matter of law, upon notice that he had it; as a consequence of which the motorman was under a duty to keep a lookout and take proper steps to avoid an accident. In other words, con-

> struing the evidence most favorably to appellant and giving to him the full effect of every legitimate inference therefrom—as the law requires—reasonable men might well differ in their conclusions, upon the evidence so considered. NO MORE IS REQUIRED TO SUSTAIN THE VERDICT AGAINST A MOTION FOR JUDGMENT N.O.V."

In Simmonds, only the plaintiff testified that he was in a crosswalk when struck; a number of witnesses testified that he was not in the crosswalk and the testimony was overwhelming that he was not in the crosswalk. Nevertheless the jury found in favor of the plaintiff and the action of the trial judge in setting aside the verdict and entering judgment n.o.v. for the defendant was held erroneous.

The vital error of the trial judge in the instant case, joined in by the Court below, was that they assumed or presumed CONCLUSIVELY that the motorman ACTUALLY HAD A CONVULSIVE SEIZURE AND THAT THIS OCCURRED PRIOR TO THE ACCIDENT.

Had the trial court and the court below applied the Shewmaker rule, they would have found sufficient evidence together with inferences therefrom either 1) that the motorman actually had no convulsive seizure; 2) that any "spell" was due either to fright or to a head injury received as a result of either the 1st or second collision; 3) that the loss of consciousness, if any, occurred AFTER the first collision and AFTER the scream which attracted the attention of the passengers who testified.

In the instant case, as in SIMMONDS, "the plaintiff had the right of way; appellee's motorman was, as a matter of law, upon notice that he had it; as a conse-

quence the motorman was under a duty to keep a lookout and to take proper steps to avoid an accident".

There was no competent evidence at the trial to establish that the motorman actually had a seizure. The passengers obviously could not tell what was wrong with the motorman, although they saw him bleeding and dazed at some time. The only evidence offered by the defendant tending to prove that the motorman had a convulsive seizure was the opinion of Dr. Rizzoli, which was conjectural and speculative; he admitted that he did not know what was the cause of the "convulsion"; that IT WAS POSSIBLE that the motorman *could have had* a small clot in one of the vessels of his brain to precipitate it; that there were numerous causes for convulsions and he could not tell what was the cause of this one (R. 210, 211). All of his findings on examination and after numerous tests and complete history were negative or normal except the abnormal brain wave shortly after the accident. Dr. Murphy, the expert neuro-surgeon and most outstanding EEG technician, who made the first EEG report at the request of Dr. Rizzoli and the second and third EEG 3 years later at the request of plaintiffs, testified absolutely and positively that the motorman never had a convulsive seizure and that the abnormal brain wave report on the first EEG could have been caused by the head injury evi denced by the abrasion at the root of the nose and the bleeding. So, at best, this issue was one for the jury.

This rule has always been applied by the Court of Appeals below, until the instant case.

B & O RR v. *Postom,* 85 U.S. App. D.C. 207; 177 F. 2d 53

Bell v. *Brown,* 76 U.S. App. D.C. 5; 128 F. 2d 317

Carusi v. *Schulmerick,* 69 App. D.C. 76; 98 F. 2d 605, cert. den. 305 U.S. 645

Tobin v. *Pa. RR. Co.*, 69 App. D.C. 262; 100 F. 2d 435, cert den. 306 U.S. 640
Speirs v. *D.C.*, 66 App. D.C. 194; 85 F. 2d 693
Catholic U. v. *Waggaman*, 32 App. D.C. 307
Ches. B.R. Co. v. *Brez*, 39 App. D.C. 58
Glaria v. *Wash. Southern R. Co.*, 30 App. D.C. 559
Warthen v. *Hammond*, 5 App. D.C. 157
Balt. & P.R. Co. v. *Carrington*, 3 App. D.C. 101
Heurich Brewing Co. v. *McGavin*, 56 App. D.C 389; 16 F. 2d 334
Weisenberg v. *Hazen*, 63 App. D.C. 398; 73 F. 2d 318

Strange as it may seem, the opinion in *B. & O. RR.* v. *Postom*, 85 App. D.C. 207, *supra*, was written by the SAME trial judge, sitting by designation on the appellate tribunal. He showed that he was thoroughly conversant with the established rule, which he recognized and applied in affirming a judgment for the plaintiff in that case. In POSTOM, Judge Holtzoff said:

> "To justify the submission of a case to the jury and to permit its verdict to stand, it is necessary that there be substantial evidence to support EITHER conclusion that may be reached. A mere scintilla of evidence is not sufficient. Substantial evidence is evidence of such quality and weight as would be sufficient to justify a reasonable man in drawing the inference to be sustained. (Citing cases) * * * If substantial evidence is presented, which, if credited, would sustain a verdict in favor of one party or the other, THE CASE SHOULD BE LEFT TO THE JURY. IT IS NOT FOR THE COURT TO WEIGH THE EVIDENCE ON BOTH SIDES OF A CONTESTED ISSUE. TO DO SO IS THE FUNCTION OF THE JURY."

Nowhere is the rule better stated than by Judge Holtzoff in that case. It is all the more surprising there-

fore that he did not apply the same rule and reasoning to the present case, and that the Court of Appeals followed blindly.

II.

The Decision of the Court of Appeals is in Conflict With the Applicable Decisions of the United States Supreme Court

The rule in force in the District of Columbia is the rule which was made by this Court from earliest times and which has remained constant and unchanged up to the present moment.

Judge Holtzoff recognized this in Postom, *supra,* by citing the applicable decisions of this Court, to the same effect:

> "It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is NOT one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts, being undisputed, fair-minded men will honestly draw different conclusions from them."
>
> *Richmond & Danville R. Co.* v. *Powers,* 149 U.S. 43; 13 S. Ct. 748; 37 L. ed. 642
> *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U.S. 54; 63 S. Ct. 444; 87 L. ed. 610; 143 ALR 967.

Judge Holtzoff again quotes this Court:

> "The very essence of its (i.e. jury's) function is to select from among conflicting inferences and conclusions that which IT considers most reasonable."
>
> *Tennant* v. *Peoria & P.U.R. Co.,* 321 U.S. 29; 64 S. Ct. 409; 88 L. ed. 520

In footnote 2, at page 209, in *B & O* v. *Postom* (85 App. D.C. 207), Judge Holtzoff cites *Gunning* v. *Cooley,*

281 U.S. 90, 50 S. Ct. 231; 74 L. ed. and *Lavender* v. *Kurn,* 327 U.S. 645; 66 S Ct. 740; 90 L. ed. 916 as approving the established rule.

In *Lavender* v. *Kurn, supra,* the question at issue was whether the plaintiff's decedent had been murdered or was killed as a result of defendant's negligence. This Court pointed out, 327 U.S. 645, at page 652, that there was evidence from which EITHER inference might reasonably be made, but since the JURY made the inference that the deceased met his death as a result of defendant's negligence, IT WOULD BE AN UNDUE INVASION OF THE JURY'S FUNCTION FOR AN APPELLATE COURT TO ARRIVE AT THE OPPOSITE CONCLUSION.

Among many other cases supporting this doctrine are:

Wilkerson v. *McCarthy,* 336 U.S. 53; 69 S. Ct. 413
Bailey v. *Central Vermont Ry. Co.,* 319 U.S. 350; 63 S. Ct. 1062; 87 L. ed. 1444
Best v. *District of Columbia,* 291 U.S. 411; 54 S. Ct. 487; 78 L. ed. 882, reversing 62 App. D.C. 271; 66 F. 2nd 797
Weightman v. *Corp. of Wash.,* 66 U.S. 39; 1 Black 39; 17 L. ed. 52
D.C. v. *Robinson,* 21 S. Ct. 283; 180 U.S. 92; 45 L. ed. 440, affmg. 14 App. D.C. 512
Sartor v. *Arkansas Nat. Gas. Corp.,* 64 S. Ct. 724; 321 U.S. 620; 88 L. ed. 967
Montgomery Ward v. *Duncan,* 61 S. Ct. 189; 311 U.S. 243; 85 L. ed. 147, modifying 108 F. 2d 848, reversing 27 F. Supp. 4

As this Court has consistently held, the Federal Rule, (Rule 50(b) F.R. Civ. Proc.) giving a district judge the right to enter a judgment contrary to a jury's verdict, has NOT taken away from juries and given to judges ANY part of the EXCLUSIVE POWER OF JURIES to

weigh evidence and determine contested factual issues, AND CANNOT TAKE AWAY SUCH POWER FROM A JURY.

Berry v. *U.S.*, 61 S. Ct. 637; 312 U.S. 450; 85 L. ed. 945; rev. 111 F. 2d 615

The conclusion is inescapable to us that the decision of the courts below were in conflict with the decisions of THIS Court.

III.

The Court Below Has Permitted and Sanctioned a Flagrant Departure From the Accepted and Usual Course of Judicial Proceedings as to Call for the Exercise of the Supervisory Powers of This Court

Enough has been said to establish not only that the decisions of the courts below are in conflict with the decisions of this Court and of the Court of Appeals below, but also to conclusively establish that the court below has sanctioned such a departure from the accepted and usual course of judicial proceedings by approving the entry of a judgment n.o.v. in violation of the established rule, and not in conformity with a proper construction and interpretation of Rule 50 (b) F.R.C.P. as to call for the exercise of the supervisory powers of this Court in the interest of uniformity of decision. The question is of general importance to every litigant entitled to a jury trial in a Federal Court under the Seventh Amendment to the Constitution. It is of importance to the judges themselves who must be made to realize the restrictions and limitations on the power of a Trial Judge to set aside a verdict. The decision below likewise raises questions of vital importance to all courts and trial counsel alike. In addition to all this, the judgment of the Courts below are plainly wrong; they have confused the applicable rule of law

and obscured the established standard for trial courts and counsel; they have impaired and limited, if not deprived, the right to a jury trial in Federal Courts, and contrary to established principles, have usurped and invaded the function and province of the jury in this case, which was presumably composed of "reasonable men".

IV.

Courts Are Not Permitted to Reweigh the Evidence or Set Aside a Jury Verdict Merely Because Different Inferences Could be Drawn or Because Judges Feel That Other Conclusions Are More Reasonable

As this Court said in *Tennant* v. *Peoria etc. R. Co.*, 321 U.S. 29, *supra:*

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the REASONABLENESS of the particular inference or conclusion drawn by the jury. It is the jury, NOT THE COURT, which is the fact finding body. It weighs the contradictory evidence, and inferences, judges the credibility of the witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. THE VERY ESSENCE OF ITS FUNCTION IS TO SELECT FROM AMONG CONFLICTING INFERENCES AND CONCLUSIONS THAT WHICH IT CONSIDERS MOST REASONABLE. * * * That conclusion, whether it relates to negligence, causation or ANY OTHER FACTUAL MATTER, CANNOT BE IGNORED."

CONCLUSION

A ruling by this Court is essential in the interest of judges, lawyers, and the proper administration of justice. There should be consistency and uniformity in

decision of legal questions involving the same principle of law or the interpretation of a Federal Rule of Civil Procedure. If the present ruling is permitted to stand, then any trial court, or any appellate court, should it so desire, can ARBITRARILY set aside the verdict of a jury and deprive a litigant of his Constitutional right to a jury trial on factual issues, as guaranteed by the Seventh Amendment to the Constitution, and the right to a jury trial will be meaningless.

Your petitioners therefore respectfully pray in this petition that this Honorable Court grant a Writ of Certiorari and bring before this Court for review, the decision and judgment of the court below.

Respectfully submitted,

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Washington 5, D. C.
Counsel for Petitioners.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,216

LEONARD J. MOORE, ET AL., APPELLANTS

v.

CAPITAL TRANSIT COMPANY, a Corporation, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided September 8, 1955

Mr. Alfred M. Schwartz, with whom *Mr. Samuel A. Friedman* was on the brief, for appellants.

Mr. John P. Arness, with whom *Mr. George D. Horning, Jr.,* was on the brief, for appellee.

Before WILBUR K. MILLER, BAZELON and WASHINGTON, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge*: Leonard J. Moore sued the Capital Transit Company to recover damages for injuries he sustained when his taxicab was struck by a streetcar in the intersection of 3rd Street and Pennsyl-

vania Avenue, N. W., in the District of Columbia. His wife sued for loss of consortium. Moore was driving southwardly on 3rd Street and entered the intersection on a green light. Another taxicab proceeding northwardly on 3rd Street also had a green light as it entered the intersection about the same time. The streetcar, which was traveling westwardly on Pennsylvania Avenue, crossed the east boundary of 3rd Street against a red light, first struck the northbound taxi and then hit Moore's cab and caused it to crash against a private automobile which was on Moore's right, also southbound.

The evidence showed that after a stop at Peace Monument the streetcar proceeded westwardly on Pennsylvania Avenue toward the intersection with 3rd Street, which was 846 feet away. Before the car reached that point, however, its operator was suddenly stricken with a convulsive seizure which rendered him unconscious. His rigid condition made it impossible for passengers to take his foot off the power pedal and stop the car before it had run the red light at 3rd Street and collided with the two taxicabs. The operator had never before had such an attack and it does not appear that he or the Transit Company had any reason to expect its occurrence.

Capital Transit's motion for a directed verdict at the close of the plaintiffs' proof was denied and a similar motion at the end of all the evidence was not granted.[1] The case was then submitted to the jury, which returned substantial verdicts in favor of the plaintiffs. Thereupon Capital Transit moved for judgment *non obstante veredicto* and also moved for a new trial. Both motions were granted and this appeal followed.

---

[1] We cannot tell from the incomplete transcript whether the trial judge denied this motion or reserved his ruling. In either event Rule 50(b) of the Federal Rules of Civil Procedure permitted the subsequent steps.

The action of the district judge in ruling on the motion for judgment *n.o.v.* and also on the motion for a new trial was in accordance with the practice approved by the Supreme Court in *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243 (1940). As indicated in that opinion, there is no need for us to remand the case for a new trial if the judgment *n.o.v.* was properly entered. We hold that it was, on the authority of *Cohen* v. *Petty,* 62 App. D. C. 187, 65 F. (2d) 820 (1933), where Judge Groner said, at page 188:

> "It is undoubtedly the law that one who is suddenly stricken by an illness, which he had no reason to anticipate, while driving an automobile, which renders it impossible for him to control the car, is not chargeable with negligence. Armstrong v. Cook, 250 Mich. 180, 229 N. W. 433; Slattery v. Haley, Dom. Law Rep., 1923 (3), p. 156."

The appellants argue that the present case is distinguishable from *Cohen* v. *Petty* because there the stricken driver did not violate a municipal ordinance, while here the streetcar ran through a red light which, say the appellants, was a violation of a municipal regulation and therefore negligence *per se.* The argument overlooks the fact that the operator was unconscious when the streetcar ran the red light.

Other reasons for reversal advanced by the appellants have been examined but do not seem to us to require discussion.

Affirmed.

IN THE

Supreme Court of the United States

October Term, 1958

No. 588

ABRAHAM J. MORRIS, ET AL., Petitioners,

v.

CAPITAL TRANSIT COMPANY, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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January 26, 1959

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IN THE

Supreme Court of the United States

October Term, 1955

No.

LEONARD J. MOORE, ET AL., *Petitioners,*

v.

CAPITAL TRANSIT COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

Where the evidence demonstrated, without substantial dispute, that the injuries and damages sustained resulted from a sudden unanticipated disability of the respondent's motorman did the trial court properly grant the respondent's motion for judgment *non obstante veredicto?*

Where the verdict rendered was contrary to law, contrary to the evidence and contrary to the weight of the evidence did the trial court properly grant respondent's alternative motion for a new trial?

Where the evidence in the record on appeal failed to demonstrate that there was any substantial basis for the claimed negligence of respondent did the United States Court of Appeals properly affirm the judgment of the trial court?

STATEMENT OF THE CASE

The evidence with respect to the events that transpired within the streetcar immediately prior to the collision complained of was given by five passengers on the streetcar and by its operator Thomas O'Brien.

John S. Chase testified that he was seated on the streetcar beside his wife. He was holding a baby and was seated next to the aisle (Rec. 153). He was watching the motorman as the streetcar left its stop at Peace Monument which was 846 feet away from the point of collision (Rec. 151, 156, 160). All of a sudden, the motorman jerked back like he was having an attack (Rec. 151). Mr. Chase handed the baby to his wife and ran up to try and stop the streetcar (Rec. 153). When he reached the operator his head was back and his body was stretched out stiff like that of a dead man (Rec. 152, 154-155). He paid no attention to whether or not there was a scream. He tried to take the operator's foot off the power pedal but was unable to do so before the streetcar glanced against the Ritz cab and struck the Yellow cab (Rec. 152, 153). The operator did not lie back just an instant before the crash. He laid back when his attack first commenced (Rec. 153). If the operator's leg had not been

stiff, Chase could have gotten it off the power pedal and stopped the streetcar before it reached the intersection (Rec. 155). The events witnessed by Mr. Chase occurred before the streetcar reached Third Street and before the crash (Rec. 153, 156).

Louise C. Shreve was seated in the middle of the streetcar on the left hand side (Rec. 107, 113). She testified that the streetcar began to shake "like it was out of control" after it left Peace Monument (Rec. 107, 114). A lady in front of her exclaimed "Something is wrong with the conductor" and she looked to see that the operator was lying with his head back and his hands stretched out stiff (Rec. 107, 108, 114, 117). She followed her first instinct to run and see what was wrong (Rec. 108). She could not budge his hand (Rec. 108). Two men came and tried to get his feet off the treadle but they were stiff and "wouldn't move". This she observed before there was any crash (Rec. 108-110). When she approached before the crash she noticed no blood on the operator but blood was present after the crash when he was on the steps (Rec. 122).

Virginia L. Gregory was seated directly behind the motorman facing the entrance door (Rec. 131-134). She did not look at the operator until someone yelled and a passenger exclaimed, "Oh my goodness, the driver, that fellow is sick." (Rec. 133). She then looked and saw that his body was stiff. He had fallen to the left and his buttocks were out of the seat. His eyes were rolling and he was making a gurgling sound (Rec. 132). Two male passengers attempted to take the operator's foot from the power pedal (Rec. 133). She noticed that the operator was stiff before the streetcar reached Third Street (Rec. 133).

Kato Funny, Jr. was seated part way back in the streetcar (Rec. 140, 143). Upon hearing a scream he looked up and saw the motorman leaning back with his arms up (Rec. 145). He ran to the operator, whose head was back, shook him and said "This man is dead". He tried to get the operator's foot off the power pedal but it was frozen thereon (Rec. 140, 145). He stated that all this occurred before there was any crash (Rec. 141). He subsequently removed the operator's foot and applied the brakes (Rec. 146).

On plaintiff's rebuttal Thomas Luck testified that he was seated immediately behind the operator and that he noticed none of these unusual events prior to the crash. He admitted upon cross examination, however, that he had been reading the directions on a can of wax and was not paying attention to anything that was going on up until the accident (Rec. 280-281).

Thomas O'Brien testified that he recalled nothing after making his stop at Peace Monument (Rec. 160-161). He had never before suffered any attack of unconsciousness (Rec. 162). He had never been subject to seizures, convulsions of fits (Rec. 163). He had always worked regularly up to the time of the accident and had had no serious illness (Rec. 176). His health had been good earlier on the day of the accident (Rec. 160). He had not felt bad that morning; was not tired; felt no pains, sickness, discomfort or physical distress; and had no warning or premonition before he lost consciousness (Rec. 160, 162, 178, 180, 193).

Dr. Rizzoli, who examined Mr. O'Brien shortly after the accident testified that convulsions result from numerous causes, among which are: scar tissue on the brain from trauma; occlusions of small blood vessels in brain; persistent and excessive use of alcohol; minor

congenital abnormalities; poisons; diabetic coma; tumor; and infections such as meningitis and encephalitis (Rec. 208, 211). After extensive diagnostic studies Dr. Rizzoli excluded diabetes, infection and tumor as causative factors and concluded that, in his opinion, Mr. O'Brien probably had "an occlusion of a small artery in the brain which disturbed the brain waves enough to produce a convulsion" (Rec. 212-215). He said such convulsion came on suddenly like a stroke (Rec. 215).

Dr. Murphy, who examined Mr. O'Brien, was called as an expert witness for petitioners. His clinical findings and the history taken were negative (Rec. 238, 244). In his opinion convulsions were synonymous with epilepsy and he was of the opinion that Mr. O'Brien did not have epilepsy (Rec. 263, 266). He attempted to express his opinion that the operator was rendered unconscious by reason of a blow on the head, however, that opinion was stricken for the reason that there was no evidence in the record which would sustain the conclusion inherent in his opinion that Mr. O'Brien had sustained a blow to the head prior to the collision (Rec. 250-51, 263-264). Dr. Murphy was of the opinion that unconsciousness can result from fright (Rec. 240, 268). However, there was no evidence to the effect that that had happened and he agreed that he had never known one who had fainted from fright to gurgle, mutter incoherently or require force to move his extremities. These symptoms he said were peculiar to convulsive seizures (Rec. 276).

Several attempts were made by petitioners' counsel to introduce evidence to the effect that Mr. O'Brien had requested time off from work earlier on the day in question. However, the attempts were not consistent

for on direct examination of Mr. O'Brien counsel for respondent attempted to bring out the substance of the conversation which Mr. O'Brien had had with the station clerk and was precluded from so doing by petitioner's objection (Rec. 177). It is not apparent of record why petitioners' counsel would seek to exclude on one occasion that which he would introduce on another (Rec. 188-193).[1] At any rate, the proffer of proof made was completely lacking in probative force (Rec. 191) and was excluded properly for the reasons stated by the trial court (Rec. 192).

ARGUMENT

There are no disputes concerning the questions of law raised by petitioners. Respondent agrees with petitioners' statement of law. However, respondent submits that there is absolutely no basis for petitioners' contention that the United States District Court or the United States Court of Appeals incorrectly applied the principles stated.

The reference to Judge Holtzoff's opinion in *B. & O. R.R.* v. *Postom,* 85 U.S. App. D.C. 207, 177 F. 2d 53 made by petitioners' counsel demonstrates the familiarity of the trial court with the principle as well as his conviction of its validity (Petition p. 20). The United States Court of Appeals for the District of Columbia Circuit has frequently stated and applied the principle which petitioners contend for here. *Peigh* v. *B. & O. R.R.,* 92 U.S. App. D.C. 198, 204 F. 2d 319; *Higashi* v.

[1] Counsel for petitioners knew what Mr. O'Brien's reasons were because he was familiar with the record in *Thomas* v. *Capital Transit Company,* 83 A. 2d 584 (Mun. App. D.C. 1951) which also grew out of these collisions and with the oral deposition which had been taken of Mr. O'Brien.

Shifflett, 90 U.S. App. D.C. 302, 195 F. 2d 784; *Shewmaker* v. *Capital Transit Company,* 79 U.S. App. D.C. 102, 143 F. 2d 142. Certainly, there is no showing that Judges Miller, Bazelon and Washington departed from those standards in the instant case.

The truth of the matter herein involved is well stated by Judge Holtzoff upon the granting of respondent's alternative motions in accordance with this Court's opinion in *Montgomery Ward & Co.* v. *Duncan,* 311 U.S. 243 (1940):

> "It is a case where the jury chose to take the law into its own hands in disregard of the rules of law applicable to the case and as to which the jury was instructed by the Court". (Rec. 297)

The facts as stated in the unanimous opinion of the United States Court of Appeals are supported without substantial contradiction in the record (Rec. 305). In view of the applicable authorities no conclusion other than that reached by both courts is possible. *Cohen* v. *Petty,* 62 App. D.C. 187, 65 F. 2d 820 (1933); *Thomas* v. *Capital Transit Co.,* 83 A. 2d 584 (Mun. App. D.C.); *Lord* v. *Carew and English,* 89 Cal. App. 2d 199, 200 P. 2d 828; *Armstrong* v. *Cook,* 250 Mich. 180, 229 N.W. 433; *Weldon Tool Co.* v. *Kelley,* 81 Ohio App. 427, 76 N.E. 2d 629; *Beiner* v. *Nassau Electric R. Co.,* 191 App. Div. 371, 181 N. Y. Supp. 628; *Thayer* v. *Thayer,* 286 Mich. 273, 282 N.W. 145 (1938); *LaVigne* v. *LaVigne,* 176 Ore. 634, 158 P. 2d 557 (1945); *Lobert* v. *Pack,* 337 Pa. 103, 9 A. 2d 365 (1930); *Kaplan* v. *Kaplan,* 213 Iowa 646, 239 N.W. 682; *Bushnell* v. *Bushnell,* 103 Conn. 583, 131 Atl. 432 (1925); *Richards* v. *Parks,* 19 Tenn. App. 615, 93 S.W. 2d 639 (1935); and *Dishman* v. *Whitney,* 121 Wash. 157, 209 Pac. 12 (1922).

In contradiction to the testimony of the eye witnesses petitioners offer only the opinion of Dr. Murphy to the effect that fright is a possible cause of the unconsciousness and that Mr. O'Brien sustained a head injury which caused him to react as he did. Petitioners' plea for the adoption of Dr. Murphy's speculative opinions and their reliance thereon actually amounts to the contention that the testimony of the eye witnesses on the streetcar should be rejected, for it is obvious that the events reflected by the testimony could not have occurred in a brief instant. Dr. Murphy's opinion that Mr. O'Brien's difficulty stemmed from a blow received in the collision is inconsistent with physical fact. The fast moving streetcar covered a distance of only 13 feet between the collision with the Ritz cab and the collision with the Yellow cab in which the male petitioner was traveling. His opinions were, therefore, properly rejected. It is:

> "axiomatic that it [opinion] must be based upon conceded or proved facts, and that naked opinion, based obviously on mere speculation and conjecture, does not rise to the dignity of evidence, especially when it is in conflict with conceded physical facts . . ." *Atlantic Life Ins. Co.* v. *Vaughan,* 71 F. 2d 394 (6th Cir. 1934). [Expression added]

The authorities require that expert opinion be based upon facts from which a reasonably sound and accurate conclusion as distinguished from a mere guess or conjecture can be made. An opinion is not admissible where its factual foundation is nebulous. *Shapleigh* v. *United Farms Co.,* 100 F. 2d 287 (5th Cir. 1938); *Gilbert* v. *Gulf Oil Co.,* 175 F. 2d 705 (4th Cir. 1949); *NLRB* v. *American Pearl Button Co.,* 149 F. 2d 311 (8th Cir. 1945); *Henkel* v. *Varner,* 78 U.S. App. D.C. 197, 138 F. 2d 934 (1943); *Dairymen's Milk Co.* v.

McCormick Co., 114 F. 2d 736 (3rd Cir. 1940); *Hupp Motor Car Co.* v. *Wadsworth*, 113 F. 2d 827 (6th Cir. 1940); *Magnolia Petroleum Co.* v. *NLRB*, 112 F. 2d 545 (5th Cir. 1940); *U.S.* v. *American Tobacco Co.*, 39 F. Supp. 959 (D.C. Ky. 1941); and *Marshall* v. *Sellers*, 188 Md. 508, 53 A. 2d 5 (1947); *Cross Co.* v. *Simmons*, 96 F. 2d 482 (8th Cir., 1938).

Under the facts in the instant case the operator could not be charged with negligence for:

> "There cannot be an act without volition. Therefore, a contraction of a person's muscles which is purely a reaction to some outside force, . . . or the convulsive movements of an epileptic, are not acts of that person. So too, movements of the body during sleep when the will is abeyance are not acts." *Restatement, Torts*, § 2.

Weldon Tool Co. v. *Kelley, supra; Lobert* v. *Pack, supra.*

A fortiori the respondent could not be charged with negligence for the record is absolutely devoid of evidence which would support a finding that respondent had notice of a sufficient substance to charge it with negligently having permitted Mr. O'Brien to operate its streetcar.

The arguments of petitioners fail to show that the trial court or the Court of Appeals were incorrect in any manner. Certainly there is no showing of conflict with the decisions of this Court or any other. There is no demonstration of radical departure from established procedure. The argument with respect to petitioners' right to trial by jury fails to meet the issue. The rule empowering courts to grant judgment *non obstante veredicto* contemplates such action when the

evidence fails to sustain the claimed cause of action as it does in this instance.

CONCLUSION

The decisions below are correct and represent matters of purely local law for the District of Columbia. The reasons stated for granting the writ of certiorari are unsound and are lacking in evidential support.

It is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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